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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 569

UNITED STATES OF AMERICA ON THE RELATION OF Arthur Kassin, petitioner

v.

HONORABLE RAYMOND J. MULLIGAN, UNITED STATES Marshal for the Southern District of New York, and Honorable Garrett W. Cotter, United States Commissioner for the Southern District of New York

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the Circuit Court of Appeals (R. 214–216) is reported in 73 F. (2d) 274; that of the District Court (R. 200) has not been reported.

JURISDICTION

The judgment sought to be reviewed was entered November 13, 1934 (R. 216). The petition for a

writ of certiorari was filed in this Court December 10, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was a sufficient showing of probable cause for the prosecution.

2. Whether the Circuit Court of Appeals on habeas corpus was bound to review the United States Commissioner's finding of probable cause for the purpose of determining its correctness.

3. Whether reversible error was committed by the Commissioner in receiving in evidence certain testimony of a special agent.

STATEMENT

An indictment was returned in the United States District Court for the Southern District of Florida charging the petitioner and others with, among other things, conspiring to misapply the funds of a National Bank in Jacksonville, Fla. (R. 19 *et seq.*). The petitioner was later apprehended in the Southern District of New York, and accorded a full hearing before a United States Commissioner for the purpose of determining whether he should be committed for removal to the trial district to answer the indictment (R. 54 *et seq.*). To establish probable cause the Government introduced a certified copy of the indictment which described the petitioner by his right name and by the alias of

Arthur Starke (R. 55, 77). Testimony was then introduced establishing that during the period the conspiracy was alleged to have been in operation the petitioner under his alias of Arthur Starke had rented a safe-deposit box at a bank in St. Augustine, Fla., and had also registered at a hotel at Jacksonville Beach, Fla. (R. 56-84). Both of these acts were charged in the conspiracy count of the indictment as overt acts 16 and 18 (R. 27). The Government further established a friendly relationship in Florida between the petitioner and one of his codefendants (R. 104). The petitioner offered his own testimony denying complicity in any of the offenses charged in the indictment, but admitting his presence in Florida, and the commission of the two overt acts, *supra*, under the alias of Arthur Starke (R. 91, 93, 95). He attempted to corroborate his testimony by the introduction of depositions of four codefendants who had been previously convicted and who undertook to declare that they did not know of petitioner having any part in the commission of the crimes charged (R. 116, 164, 175, 177). Cross-examination of these defendants showed, however, that at least three of them either did not know all of the members of the conspiracy or that it was possible for the petitioner to have participated therein without the knowledge of the particular defendant (R. 128, 172, 176). The Government then offered the testimony of a special agent to the effect that two of those whose deposi-

tions had been taken had made oral statements, both before and after the taking of the depositions, which contradicted these depositions (R. 150, 153–155, 157–158, 159–161).

As the result of the hearing, the Commissioner ordered petitioner committed for removal (R. 9, 15). The petitioner thereupon filed in the United States District Court for the Southern District of New York a petition for a writ of habeas corpus alleging illegal detention based upon a claim of an absence of any showing of probable cause (R. 2–11). The writ issued (R. 11) and a return was filed (R. 14–17). Following a hearing, the writ was ordered dismissed, the District Court finding, after a review of the evidence, that probable cause was shown (R. 200). On appeal that judgment was unanimously affirmed (R. 214–216).

ARGUMENT

I

The petitioner apparently does not deny that the Government made out a prima facie case for removal by offering in evidence a certified copy of the indictment from the demanding district and by proof of identity of petitioner as one of those named as a defendant in the indictment. He contends, however, that the evidence did not establish probable cause for believing him guilty of the crimes charged in the indictment. We submit that this contention is without merit.

The conspiracy count of the indictment (R. 22) charged that "in pursuance of said conspiracy * * * and to effect and accomplish the object thereof, and with the intent and for the purpose of effecting and accomplishing the object thereof", certain overt acts were committed by the various defendants. The evidence shows conclusively that the petitioner committed two of the overt acts charged. These overt acts were committed within the jurisdiction of the demanding district at points readily accessible, through modern means of transportation, to the bank whose funds were to be misapplied. Coupled with this evidence was an admission by the petitioner that he committed the overt acts referred to. His attempted explanation of his presence in Florida at the time the conspiracy was under way was apparently not believed by the United States Commissioner, who heard his testimony and was in the best position to judge of his credibility. It is well settled that upon an appeal in a proceeding to prevent removal, it is not within the province of the appellate court to weigh the evidence, but merely to determine whether there was before the Commissioner any competent evidence to support his finding. *Hughes* v. *Gault,* 271 U. S. 142, 151; *Hyde* v. *Shine,* 199 U. S. 62, 84; *Horner* v. *United States. No. 1,* 143 U. S. 207, 215; *Bonaventura* v. *United States,* 55 F. (2d) 833, 834 (C. C. A. 9th); *Wood* v. *Cooper,* 18 F. (2d) 535, 538 (C. C. A. 8th), certiorari denied, 274 U. S. 750; *Albury* v. *Dyson,* 285 Fed. 738, 739 (C. C. A. 5th).

The competency of the evidence referred to is not attacked.

What the petitioner is really seeking is to have this Court review the evidence to determine whether it would reach a conclusion different from that reached by the Commissioner. This would require a weighing of the evidence, which this Court has held is not within its province even upon appeal taken in a criminal proceeding itself. *Crumpton* v. *United States,* 138 U. S. 361, 363; *Johnson* v. *United States,* 157 U. S. 320, 326. *A fortiori* the evidence will not be weighed in a proceeding for habeas corpus. *Hyde* v. *Shine,* 199 U. S. 62, 84. Neither wrong decision nor the reception and consideration of incompetent evidence affords a basis for relief on habeas corpus. Cf. *Vajtauer* v. *Commissioner,* 273 U. S. 103. There must be an "entire lack of evidence" to support the Commissioner's finding of probable cause to warrant discharge. *Hyde* v. *Shine, supra,* p. 84. In view of the evidence recited above, it cannot be said that the Commissioner committed a "palpable injustice" in committing the petitioner for removal. *Hughes* v. *Gault, supra,* p. 150.

II

Petitioner also contends that the Circuit Court of Appeals erroneously restricted the scope of appellate review in a removal proceeding by refusing

in the present case to review the evidence for the purpose of determining whether his evidence overcame that adduced by the Government.

We do not believe that it is necessary in this case to pass upon the correctness of the reasoning of the Circuit Court of Appeals, for it has been repeatedly held by this Court that it is concerned with the correctness of the judgment below rather than the reasons given in support of such judgment. See *Ex parte Royall*, 117 U. S. 241, 250; *Smith* v. *Whitney*, 116 U. S. 167, 175; *Dayton P. & L. Co.* v. *Commission*, 292 U. S. 290, 298. A review of the evidence by the Circuit Court of Appeals would have established that there was, as was found by the District Court (R. 200), at least some competent evidence to support the Commissioner's finding of probable cause, which was all that was required. There is, therefore, in this case no basis for the assertion of a conflict of decisions based upon a difference of opinion in the Circuit Courts of Appeals as to the evidential effect of the indictment alone in a removal proceeding.[1]

III

No extended discussion is required of the petitioner's contention that the Commissioner erred in receiving in evidence the testimony of a special agent to the effect that several of the petitioner's

[1] See, however, in this connection *Fetters* v. *United States*, 283 U. S. 638, 641.

codefendants had orally contradicted certain statements they had made in the depositions used by the petitioner at the hearing. This contention seems to be based upon the premise that all the contradictory statements were made prior to the taking of the dispositions, but it should be pointed out that some of the contradictory statements were made after the depositions were taken. (*Supra*, pp. 3–4.) In any event, it is clear that no basis for relief on habeas corpus is afforded merely because incompetent evidence has been received and considered. *Vajtauer* v. *Commissioner*, 273 U. S. 103, *supra*. *Cf. Collins* v. *Loisel*, 259 U. S. 309, 314–315. While it may well be argued that the challenged testimony was competent under such decisions as *Hughes* v. *Gault*, *supra*, and *Fetters* v. *United States*, 283 U. S. 638, 642, *supra*, we submit that even though this testimony be eliminated, there remained sufficient competent evidence to support the finding of the Commissioner. Under any view no "palpable injustice" was committed by the Commissioner. *Hughes* v. *Gault*, *supra*.

In conclusion it may be stated that, as we see it, the petitioner has presented no stronger case against removal than did his codefendant Jerihem Seeman, whose petition for writ of certiorari was denied by this Court at the last term (292 U. S. 654).

CONCLUSION

The petitioner presents no question requiring review on writ of certiorari. We therefore respectfully submit that the petition should be denied.

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JANUARY 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935